

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term 2007

(Argued: March 5, 2008)

Decided: March 25, 2008)

Docket No. 07-5771-cv

AIR TRANSPORT ASSOCIATION OF AMERICA, INC.,
Plaintiff-Appellant,

-v.-

ANDREW CUOMO, in his official capacity as Attorney General
of the State of New York, MINDY A. BOCKSTEIN, in her
official capacity as Chairperson and Executive Director
of the New York State Consumer Protection Board,
Defendants-Appellees.

Before: WESLEY, LIVINGSTON, *Circuit Judges*, and
COGAN, *District Judge*.*

The Air Transport Association of America appeals from a final judgment of the United States District Court for the Northern District of New York (Kahn, J.) granting summary judgment to defendants and dismissing plaintiff's complaint seeking declaratory and injunctive relief against New York State's Passenger Bill of Rights, codified at section 553(2)(b)-(d) of the New York

* The Honorable Brian M. Cogan, District Judge, United States District Court for the Eastern District of New York, sitting by designation.

1 Executive Law and sections 251-f to 251-j of the New York General Business
2 Law. We reverse and hold that the substantive provisions of the law, N.Y. Gen.
3 Bus. Law § 251-g(1), are preempted by the Airline Deregulation Act of 1978.

4 Reversed and remanded.

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14
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19 eral of the State of New York, *on the brief*), *for*
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21
22 Paul S. Hudson, Sarasota, FL (Burton Jay
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24 *Curiae Aviation Consumer Action Project and*
25 *Coalition for an Airline Passengers' Bill of*
26 *Rights in Support of Defendants-Appellees*.

27
28
29 PER CURIAM:

30 Appellant Air Transport Association of America (“Air Transport”), the
31 principal trade and service organization of the United States airline industry,
32 appeals from an order of the United States District Court for the Northern

1 District of New York (Kahn, J.) granting summary judgment to Appellees and
2 dismissing its complaint seeking declaratory and injunctive relief against
3 enforcement of the New York State Passenger Bill of Rights (the “PBR”), 2007
4 N.Y. Sess. Laws, ch. 472 (codified at N.Y. Exec. Law § 553(2)(b)-(d); N.Y. Gen.
5 Bus. Law §§ 251-f to 251-j). *Air Transp. Ass’n of Am. v. Cuomo*, 528 F. Supp. 2d
6 62 (N.D.N.Y. 2007). We hold that the PBR is preempted by the express preemp-
7 tion provision of the Airline Deregulation Act of 1978 (the “ADA”) and therefore
8 reverse.

10 BACKGROUND

11 Following a series of well-publicized incidents during the winter of 2006-
12 2007 in which airline passengers endured lengthy delays grounded on New York
13 runways, some without being provided water or food, the New York legislature
14 enacted the PBR. The substantive provisions of the PBR state as follows:

15 1. Whenever airline passengers have boarded an
16 aircraft and are delayed more than three hours on the
17 aircraft prior to takeoff, the carrier shall ensure that
18 passengers are provided as needed with:

19 (a) electric generation service to provide temporary
20 power for fresh air and lights;

21 (b) waste removal service in order to service the
22 holding tanks for on-board restrooms; and

23 (c) adequate food and drinking water and other
24 refreshments.

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2 N.Y. Gen. Bus. Law § 251-g(1). The law also requires all carriers to display
3 consumer complaint contact information and an explanation of these rights. *Id.*
4 § 251-g(2). Section 251-g took effect on January 1, 2008. 2007 N.Y. Sess. Laws,
5 ch. 472, § 5.

6 Air Transport filed suit in the United States District Court for the
7 Northern District of New York seeking declaratory and injunctive relief on the
8 grounds that the PBR is preempted by the ADA and violates the Commerce
9 Clause of the U.S. Constitution. Appellant Air Transport moved for summary
10 judgment, and the district court granted summary judgment *sua sponte* to the
11 appellees, holding that the PBR was not expressly preempted by the ADA
12 because it is not “related to a price, route, or service of an air carrier,” *Air*
13 *Transp.*, 528 F. Supp. 2d at 66-67 (quoting 49 U.S.C. § 41713(b)(1)) (internal
14 quotation mark omitted), and was not impliedly preempted because Congress did
15 not intend for the ADA to occupy the field of airplane safety, *id.* at 67-68. We
16 granted Air Transport’s motion for an expedited appeal.

17 18 DISCUSSION

19 We review the district court’s grant of summary judgment de novo. *SEC*
20 *v. Kern*, 425 F.3d 143, 147 (2d Cir. 2005); *see also Drake v. Lab. Corp. of Am.*
21 *Holdings*, 458 F.3d 48, 56 (2d Cir. 2006) (“[A] determination regarding preemp-

tion is a conclusion of law, and we therefore review it de novo.”).

The Supremacy Clause, U.S. Const. art VI, cl. 2, “invalidates state laws that ‘interfere with, or are contrary to,’ federal law.” *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)). Preemption can be either express or implied. Express preemption arises when “a federal statute expressly directs that state law be ousted.” *Ass’n of Int’l Auto. Mfrs. v. Abrams*, 84 F.3d 602, 607 (2d Cir. 1996). Implied preemption arises when, “in the absence of explicit statutory language, . . . Congress intended the Federal Government to occupy [a field] exclusively,” or when state law “actually conflicts with federal law.” *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). More specifically, preemption is implied when “the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where ‘the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose.’” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (omission in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Congress has enacted two statutes that potentially bear on the subject matter of the PBR: (1) the ADA, Pub. L. No. 95-504, 92 Stat. 1705 (1978); and (2) the Federal Aviation Act of 1958 (the “FAA”), Pub. L. No. 85-726, 72 Stat. 731. We begin with the former.

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I.

“Since the existence of preemption turns on Congress’s intent, we are to begin as we do in any exercise of statutory construction[,] with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs.” *McNally v. Port Auth. of N.Y. & N.J. (In re WTC Disaster Site)*, 414 F.3d 352, 371 (2d Cir. 2005) (alteration in original) (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). The ADA’s express preemption provision states as follows:

Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1). The exceptions to which this provision refers are not applicable in this case. Thus, the PBR is preempted if it is “related to a price, route, or service of an air carrier.” We conclude that it is.

A.

Air Transport’s complaint asserts a claim under the Supremacy Clause and a claim that the PBR violates § 41713(b)(1). Importantly, § 41713(b)(1) does

1 not provide an express private right of action, and we have held with regard to
2 its predecessor statute, which is substantively identical, that no private right of
3 action can be implied. *W. Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d
4 222, 225 (2d Cir. 1987); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91,
5 97 (2d Cir. 1986). Air Transport therefore cannot sue for a violation of the
6 statute.

7 Nevertheless, Air Transport is entitled to pursue its preemption challenge
8 through its Supremacy Clause claim. The distinction between a statutory claim
9 and a Supremacy Clause claim, although seemingly without a difference in this
10 particular context, is important and is not a trifling formalism:

11 A claim under the Supremacy Clause that a federal
12 law preempts a state regulation is distinct from a claim
13 for enforcement of that federal law. . . . A claim under
14 the Supremacy Clause simply asserts that a federal
15 statute has taken away local authority to regulate a
16 certain activity. In contrast, an implied private right of
17 action is a means of enforcing the substantive provi-
18 sions of a federal law. It provides remedies, frequently
19 including damages, for violations of federal law by a
20 government entity or by a private party. The mere
21 coincidence that the federal law in question in this case
22 contains its own preemption language does not affect
23 this distinction.

24 *W. Air Lines*, 817 F.2d at 225-26. Moreover, contrary to amici's suggestion, Air
25 Transport's preenforcement challenge presents no problem of unripeness or
26 other barriers to justiciability. *See Morales v. Trans World Airlines, Inc.*, 504

1 U.S. 374, 380-81 (1992) (citing *Ex parte Young*, 209 U.S. 123, 145-47, 163-65
2 (1908)).

3 4 **B.**

5 Congress enacted the ADA in 1978, loosening its economic regulation of
6 the airline industry after determining that “‘maximum reliance on competitive
7 market forces’ would best further ‘efficiency, innovation, and low prices’ as well
8 as ‘variety [and] quality . . . of air transportation.’” *Id.* at 378 (alteration and
9 omission in original) (quoting 49 U.S.C. app. § 1302(a)(4), (9) (1988)). “To ensure
10 that the States would not undo [this] deregulation with regulation of their own,”
11 Congress included an express preemption provision. *Id.*; *see also id.* at 389-91
12 (holding that the ADA expressly preempted the application of state deceptive
13 business practice laws to airline fare advertisements because such regulation
14 related to air carrier prices). Recognizing this goal, the Supreme Court has
15 repeatedly emphasized the breadth of the ADA’s preemption provision. *See Am.*
16 *Airlines, Inc. v. Wolens*, 513 U.S. 219, 225-26 (1995); *id.* at 235 (Stevens, J.,
17 concurring in part and dissenting in part); *Morales*, 504 U.S. at 383-84; *see also*
18 *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. ---, 128 S. Ct. 989, 998 (2008)
19 (Ginsburg, J., concurring) (noting the “breadth of [the] preemption language” in
20 the Federal Aviation Administration Authorization Act of 1994, whose

1 preemption provision, 49 U.S.C. § 14501(c)(1), is in pari materia with that of the
2 ADA).

3 Although this Court has not yet defined “service” as it is used in the ADA,
4 we have little difficulty concluding that requiring airlines to provide food, water,
5 electricity, and restrooms to passengers during lengthy ground delays relates to
6 the service of an air carrier. This conclusion draws considerable support from
7 the Supreme Court’s recent unanimous opinion in *Rowe* construing 49 U.S.C.
8 § 14501(c)(1)’s identically worded preemption provision. In *Rowe*, the Court
9 addressed a Maine law imposing, among other obligations, a requirement that
10 retailers shipping tobacco products to customers within the State use a delivery
11 service that provides certain forms of recipient verification — a law enacted,
12 according to the State, to further its interest in preventing minors from
13 obtaining cigarettes. The *Rowe* Court reiterated its conclusions from *Morales* in
14 construing the ADA:

15 (1) that “[s]tate enforcement actions having a connec-
16 tion with, or reference to” carrier “‘rates, routes, or
17 services’ are pre-empted”; (2) that such pre-emption
18 may occur even if a state law’s effect on rates, routes or
19 services “is only indirect”; (3) that, in respect to
20 pre-emption, it makes no difference whether a state law
21 is “consistent” or “inconsistent” with federal regulation;
22 and (4) that pre-emption occurs at least where state
23 laws have a “significant impact” related to Congress’
24 deregulatory and pre-emption-related objectives.

25 128 S. Ct. at 995 (alteration in original) (emphasis omitted) (citations omitted)

1 (quoting *Morales*, 504 U.S. at 384, 386-87, 390). The Court emphasized that
2 Congress’s “overarching goal” with regard to the ADA was helping to assure that
3 transportation rates, routes, and services “reflect[ed] ‘maximum reliance on
4 competitive market forces,’ thereby stimulating” not only “‘efficiency, innovation,
5 and low prices,’” but also “‘variety’ and ‘quality’” in transportation services. *Id.*
6 (quoting *Morales*, 504 U.S. at 378).

7 A majority of the circuits to have construed “service” have held that the
8 term refers to the provision or anticipated provision of labor from the airline to
9 its passengers and encompasses matters such as boarding procedures, baggage
10 handling, and food and drink — matters incidental to and distinct from the
11 actual transportation of passengers. See *Travel All Over the World, Inc. v.*
12 *Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996); *Hodges v. Delta*
13 *Airlines, Inc.*, 44 F.3d 334, 336-38 (5th Cir. 1995) (en banc); see also *Branche v.*
14 *Airtran Airways, Inc.*, 342 F.3d 1248, 1257 (11th Cir. 2003) (referring to the
15 *Hodges* definition as the “more compelling” of the alternative definitions that
16 have been adopted); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998)
17 (citing *Travel All Over the World* and *Hodges* in holding that tort claims “based
18 in part upon [an airline’s] refusal of permission to board” are preempted because
19 “boarding procedures are a service rendered by an airline”); *Chukwu v. Bd. of*
20 *Dirs. British Airways*, 889 F. Supp. 12, 13 (D. Mass. 1995) (adopting the *Hodges*

1 definition), *aff'd mem. sub nom. Azubuko v. Bd. of Dirs. British Airways*, 101
2 F.3d 106 (1st Cir. 1996). The Third and Ninth Circuits, in contrast, have
3 construed service to refer more narrowly to “the prices, schedules, origins and
4 destinations of the point-to-point transportation of passengers, cargo, or mail,”
5 but not to “include an airline’s provision of in-flight beverages, personal
6 assistance to passengers, the handling of luggage, and similar amenities.”
7 *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (en
8 banc); *accord Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 193-94
9 (3d Cir. 1998).

10 *Charas’s* approach, we believe, is inconsistent with the Supreme Court’s
11 recent decision in *Rowe*. There, the Court necessarily defined “service” to extend
12 beyond prices, schedules, origins, and destinations. Indeed, in determining that
13 the ADA’s preemption provision reached, among other things, the imposition of
14 recipient verification requirements on tobacco shipments, the Court stated
15 expressly that “federal law must . . . pre-empt Maine’s efforts directly to regulate
16 carrier *services*.” *Rowe*, 128 S. Ct. at 998 (emphasis added). It noted further
17 that to interpret the federal preemption provision not to reach such regulation
18 “could easily lead to a patchwork of state service-determining laws, rules, and
19 regulations,” which would be “inconsistent with Congress’ major legislative effort
20 to leave such decisions, where federally unregulated, to the competitive

1 marketplace.” *Id.* at 996.

2 We hold that requiring airlines to provide food, water, electricity, and
3 restrooms to passengers during lengthy ground delays does relate to the service
4 of an air carrier and therefore falls within the express terms of the ADA’s
5 preemption provision. As a result, the substantive provisions of the PBR,
6 codified at section 251-g(1) of the New York General Business Law, are
7 preempted.

8 The unanimous *Rowe* opinion held that Maine’s law resulted in Maine’s
9 “direct substitution of its own governmental commands for ‘competitive market
10 forces’” in determining “the services that motor carriers will provide” to their
11 customers. *Id.* at 995 (quoting *Morales*, 504 U.S. at 378). In this respect, the
12 PBR is indistinguishable. It substitutes New York’s commands for competitive
13 market forces, requiring airlines to provide the services that New York specifies
14 during lengthy ground delays and threatening the same “patchwork of state
15 service-determining laws, rules, and regulations” that concerned the Court in
16 *Rowe*.¹ *Id.* at 996.

¹ At least nine other states have proposed legislation regarding lengthy ground delays. See H.R. 2149, 48th Leg., 2d Reg. Sess. (Ariz. 2008); Assem. 1943, 2007-2008 Reg. Sess. (Cal. 2008); S. 2062, 110th Reg. Sess. (Fla. 2008); S. 161, 115th Gen. Assem., 2d Reg. Sess. (Ind. 2008); H.R. 5475, 94th Legis., 2007 Reg. Sess. (Mich. 2007); Assem. 967, 213th Leg., 1st Ann. Sess. (N.J. 2008); H.R. 2055, 190th Gen. Assem., 2007 Sess. (Pa. 2007); S. 2088, 2008 Legis. Sess. (R.I. 2008); S. 6269, 60th Legis., 2008 Reg. Sess. (Wash. 2008). These proposed laws would impose obligations ranging from a requirement that the airline accommodate passengers on the next available route, see Mich. H.R. 5475 § 5(2), to a requirement that

Additionally, we note that *Rowe* declined to read into § 14501(c)(1)’s preemption provision an exception that preserves state laws protecting the public health. *Id.* at 996-97. *Rowe* accordingly forecloses New York’s argument and the district court’s conclusion, *see Air Transp.*, 528 F. Supp. 2d at 67, that classifying the PBR as a health and safety regulation or a matter of basic human necessities somehow shields it from the preemptive force of § 41713(b)(1). Onboard amenities, regardless of whether they are luxuries or necessities, still relate to airline service and fall within the express terms of the preemption provision — a conclusion, we note, that even the drafters of the PBR appear to have been unable to escape. *See* N.Y. Gen. Bus. Law § 251-g(1)(a) (referring to “electric generation service ”); *id.* § 251-g(1)(b) (referring to “waste removal service ”).

II.

Insofar as the PBR is intended to prescribe standards of airline safety, we

passengers be permitted to disembark, *see* Pa. H.R. 2055 § 3(b). It is irrelevant that these bills all seek to impose the same principal service obligations as the PBR — requiring airlines to provide food, water, electric generation, and waste removal after a three-hour ground delay — for state laws related to airline service are preempted regardless of whether they are consistent with each other and regardless of whether they are consistent with the ADA’s objective. *Rowe*, 128 S. Ct. at 995; *Morales*, 504 U.S. at 386-87. We note that the Department of Transportation has proposed and sought comment on several similar passenger protection measures that could provide uniform standards to deal with lengthy ground delays. *See* Enhancing Airline Passenger Protections, 72 Fed. Reg. 65,233 (Nov. 20, 2007) (to be codified at 14 C.F.R. pts. 234, 253, 259, 399).

1 note, finally, that it may also be impliedly preempted by the FAA and regula-
2 tions promulgated thereunder. The FAA was enacted to create a “uniform and
3 exclusive system of federal regulation” in the field of air safety. *City of Burbank*
4 *v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973). Shortly after it became
5 law, we noted that the FAA “was passed by Congress for the purpose of
6 centralizing in a single authority — indeed, in one administrator — the power
7 to frame rules for the safe and efficient use of the nation’s airspace.” *Air Line*
8 *Pilots Ass’n, Int’l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960); *see also British*
9 *Airways Bd. v. Port Auth. of N.Y. & N.J.*, 558 F.2d 75, 83 (2d Cir. 1977) (“[The
10 FAA] requires that exclusive control of airspace management be concentrated
11 at the national level.”). Congress and the Federal Aviation Administration have
12 used this authority to enact rules addressing virtually all areas of air safety.
13 These regulations range from a general standard of care for operating
14 requirements, *see* 14 C.F.R. § 91.13(a) (“No person may operate an aircraft in a
15 careless or reckless manner so as to endanger the life or property of another.”),
16 to the details of the contents of mandatory onboard first-aid kits, *id.* pt. 121, app.
17 A, to the maximum concentration of carbon monoxide permitted in “suitably
18 vented” compartments, *id.* § 125.117. This power extends to grounded planes
19 and airport runways. *See id.* § 91.123 (requiring pilots to comply with all orders
20 and instructions of air traffic control); *id.* § 139.329 (requiring airlines to restrict

1 movement of pedestrians and ground vehicles on runways).

2 The intent to centralize air safety authority and the comprehensiveness
3 of these regulations pursuant to that authority have led several other circuits
4 (and several courts within this Circuit) to conclude that Congress intended to
5 occupy the entire field and thereby preempt state regulation of air safety. *See,*
6 *e.g., Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007) (“[T]he FAA
7 preempts the entire field of aviation safety through implied field preemption.
8 The FAA and regulations promulgated pursuant to it establish complete and
9 thorough safety standards for air travel, which are not subject to supplemen-
10 tation by . . . state laws.”); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d
11 784, 795 (6th Cir. 2005), *cert. denied*, 547 U.S. 1003 (2006); *Abdullah v. Am.*
12 *Airlines, Inc.*, 181 F.3d 363, 367-68 (3d Cir. 1999); *French v. Pan Am Express,*
13 *Inc.*, 869 F.2d 1, 5 (1st Cir. 1989); *Curtin v. Port Auth. of N.Y. & N.J.*, 183 F.
14 Supp. 2d 664, 671 (S.D.N.Y. 2002). Although we have not addressed this precise
15 issue, we have acknowledged that the FAA does not preempt all state law tort
16 actions. *See In re Air Crash Disaster at John F. Kennedy Int’l Airport on June*
17 *24, 1975*, 635 F.2d 67, 75 (2d Cir. 1980). However, the FAA has a savings clause
18 that specifically preserves these actions. *See* 49 U.S.C. § 40120(c).

19 If New York’s view regarding the scope of its regulatory authority carried
20 the day, another state could be free to enact a law prohibiting the service of soda

1 on flights departing from its airports, while another could require allergen-free
2 food options on its outbound flights, unraveling the centralized federal
3 framework for air travel. On this point, the decisions of the Fifth and Ninth
4 Circuits finding preemption of state common law claims for failure to warn of the
5 risk of deep vein thrombosis are instructive. *See Montalvo*, 508 F.3d at 473 (“[A]
6 state [is not] free to require any announcement it wishe[s] on all planes arriving
7 in, or departing from, its soil”); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380,
8 383-84 (5th Cir. 2004).

9 In light of our determination that the PBR is preempted by the ADA,
10 however, we need not address the scope of any FAA preemption, and we decline
11 to do so here. Although the goals of the PBR are laudable and the circumstances
12 motivating its enactment deplorable, only the federal government has the
13 authority to enact such a law. We conclude, then, by reiterating our holding that
14 the PBR’s substantive provisions, codified at section 251-g(1) of the New York
15 General Business Law, are preempted by 49 U.S.C. § 41713(b)(1).

16 17 CONCLUSION

18 For the foregoing reasons, the judgment of the district court is RE-
19 VERSED, and the case is REMANDED to the district court so that it may enter
20 summary judgment in favor of Air Transport.